

Supreme Court, U. S.

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In The

**Supreme Court of the United States**

October Term, 1976

**76-814**

No.

**CHARLES WILLIAM CAMERON,**

*Petitioner,*

vs.

**UNITED STATES OF AMERICA,**

*Respondent.*

**PETITION FOR A WRIT OF CERTIORARI TO THE  
UNITED STATES COURT OF APPEALS FOR THE  
SECOND CIRCUIT**

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**Supreme Court of the United States**

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SECOND CIRCUIT**

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**STATEMENT AND OPINION BELOW**

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit affirming his criminal conviction on September 27, 1976 (see Appendix A, 1a). Petitioner was indicted and convicted upon a single count for conspiracy to violate the federal narcotics laws [21 U.S.C. §§812, 841(a)(1), 846, 960(a)(1) and 963] in the United States District Court for the Eastern District of New York. Petitioner was sentenced on December 19, 1975 by United States District Judge Jacob Mishler, to a term of eight (8) years imprisonment, a parole term of five (5) years and a \$5,000 fine.

Petitioner was convicted along with seven (7) other defendants, six of whose convictions were, likewise, affirmed in the Court of Appeals. The conviction of one of the appealing defendants (Barbara Hinton) was reversed and the indictment was dismissed as to her (see Appendix B, 4a). Five of the original thirteen defendants who were tried in this case were acquitted after a jury trial. As of the preparation of this petition, petitioner Cameron is at large on bail pending return of the mandate from the Court of Appeals to the District Court of the Eastern District of New York.

In the Court of Appeals, petitioner made applications for a rehearing and rehearing *en banc* which were denied without any opinion on November 16, 1976 (see Appendix C, 34a).

The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(i).

### QUESTIONS PRESENTED FOR REVIEW

1. Where petitioner had already been indicted on the charges herein, and the indictment had been sealed pending arrest of all the defendants, was petitioner's interrogation at a police station in relation to his recently being kidnapped and his past activities in the narcotics trade, violative of his constitutional rights, in view of the fact that such interrogation was not preceded by *Miranda* warnings and petitioner's responses were being simultaneously secretly recorded and transmitted to the federal drug enforcement officers who had procured the sealed indictment against him?

2. Where petitioner's attorney had only recently spoken to the police about petitioner's kidnapping and drug-related activities while petitioner was still in the hands of his kidnappers, and such attorney had identified himself to the police as petitioner's counsel, was such counsel entitled to be notified of petitioner's interrogation where the interrogation was

preceded by notification to federal narcotics agencies and the Joint Task Force whose personnel listened in to petitioner's secretly tape recorded post-kidnapping statements in relation to narcotics?

3. Did the trial court err in allowing into evidence proof that petitioner had been kidnapped for a large ransom, by Black Muslims, in view of the fact that such proof prejudicially tended to support both the contention of the indictment that petitioner was a drug dealer, and a related inference that the kidnappers very likely knew about petitioner's drug-related activities, and for that reason had focussed on him as a financially viable kidnap target?

4. The Government offered proof at the trial, over defense objection, that petitioner had not filed federal income tax returns for the years 1969-1974. Was proof of petitioner's failure to file federal tax returns admissible to establish complicity in the drug conspiracy charged against him? Was not such proof offensive to petitioner's Fifth Amendment right to refuse to testify at the trial? And, was proof of failure to file tax returns both irrelevant on the issue of conspiratorial membership, and inflammatory insofar as it proved the commission of a separate crime not charged in the indictment?

### CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED IN THIS CASE

This case involves the applicability and interpretation of the Fifth and Sixth Amendments of the United States Constitution.

### STATEMENT OF THE CASE

Petitioner Cameron was convicted of conspiracy to sell and transport narcotics under Count I of the indictment which was the only count in which he was named. The independent proof against him tending to establish membership in the conspiracy

was extremely weak, consisting of the testimony of but one witness (Morehead) who stated that in 1969 (six years prior to the trial) he had once seen petitioner for about 20 minutes in an apartment in Brooklyn where, with others present, petitioner had demonstrated to him how to fold giassine bags properly, and he had also seen petitioner with some empty plastic sandwich bags.

Petitioner's conviction was the direct result of two categories of proof which together, or even separately, would have been sufficient to propel petitioner into a guilty verdict. The first of these related to a skein of evidence dealing with the kidnapping of petitioner shortly prior to the publication of the indictment herein. Following petitioner's release by Black Muslim kidnappers in exchange for a large ransom, petitioner was energetically 'debriefed' by the police who were then working covertly with Joint Task Force officials who had caused petitioner to be indicted upon the instant charges. Petitioner, at the time of the debriefing, was already under sealed indictment which had been filed in the Eastern District Court of New York prior to his kidnapping. During petitioner's debriefing, or interrogation — which was preceded by no *Miranda* or other warnings to him of possible self-incrimination — petitioner made oblique references to prior narcotics activity on his part, being then wholly unaware of the sealed, but pending, charges in this case. His remarks were in the context of the expressed interest of his police interrogators to get to the root of the kidnapping and murder activities of Black Muslims which seemed to them to be directed mainly at black drug dealers. Unbeknownst to petitioner, who was worn, battered and beaten after three days of Black Muslim brutality, which included rectal torture by firebrand, among other brutalities, his every word was being secretly recorded and simultaneously transmitted to the very federal and state officers in the next room who had earlier procured his indictment in this case. The admission into evidence of petitioner's tape recorded statements, showing knowledge peculiar mainly to those involved in drug dealing, and making it plain that he was a kidnap victim precisely because of

his presumed wealth garnered from narcotics, made it impossible for petitioner to receive a fair trial.

A second vitally prejudicial thrust against petitioner, rendering a fair trial impossible, was the admission into evidence, as proof of membership in the drug conspiracy, of the fact that petitioner had not filed federal income tax returns from 1969 to 1974. From this fact, the jury was improperly invited to speculate that petitioner had not filed tax returns only in order to avoid disclosing income produced from the narcotics activity charged in the instant case. The Government was, thus, permitted to prove a crime not charged in the indictment (non-filing) on the assumption that non-filers are involved in criminal activities, which in petitioner's case, related to illicit drug sales.

#### **A. The Incriminating Statements Given by Petitioner to the Police After his Rescue from the Kidnappers.**

On January 29, 1975, the indictment herein was filed, but was kept sealed pending arrests which did not begin until February 20, 1975. On February 4, 1975, petitioner was kidnapped by Black Muslims and word of this was relayed by petitioner's family to the police who, in turn, notified the Joint Task Force investigating narcotics activity. Two Joint Task Force officers (Garay and Mulhearn) who had worked on the sealed indictment of petitioner, promptly notified the Assistant U.S. Attorney in charge of this case of the fact of the kidnapping. These officers then proceeded to look for petitioner, in view of the sealed indictment naming him as a defendant, and because they had been investigating him in relation to the instant case since 1972.

On February 7, 1975, petitioner — after a large ransom was paid — won release from his kidnappers. During his captivity, he had been brutally tortured rectally (with a hot iron), pistol whipped, kicked, and punched. His eyes had been taped closed for three days, and he had little to eat, and scarcely any sleep

because of fear that he would be shot in the head, as threatened. The Black Muslims had also threatened to chop the hands of his young son off if the ransom was not paid.

With the help of a friend to drive him there, petitioner went as soon as possible, after his release, to an address in Brooklyn to check on his son for whose safety he had feared. The police, alerted to his release earlier because of telephone surveillance at the Brooklyn apartment which was their 'command-post', as well as the 'hiding' place of petitioner's wife and son, intercepted petitioner and quickly brought him to the 77th Precinct. Petitioner, while strenuously objecting at first to go with the police, was, after much dispute and police pressure, finally escorted by eight (8) officers to the 77th Precinct headquarters, there to be interviewed by one Capt. Steproe — the senior officer working on the kidnapping case. Petitioner was told by the officers that, while he objected to going with them, they would not take "No" for an answer.

During the time of petitioner's captivity by Black Muslims, his attorney had spoken with Capt. Steproe's men advising them that petitioner was a person previously convicted for narcotics possession. This information, furnished to provide a perspective for the police, had been passed on to Capt. Steproe, who upon being later notified of petitioner's release, directed his men to intercept petitioner and bring him directly to the 77th Precinct. At the same time, Capt. Steproe directed that all federal and state narcotics units be invited to sit in on a secret taping of petitioner at the 77th Precinct. Capt. Steproe conceded, during the suppression hearing, that he and the federal officers and Joint Task Force investigating drug activities were working together as a team. Petitioner's attorney was not notified of the projected interview with his client.

In this setting, the two Joint Task Force officers (Garay and Mulhearn) who had brought about petitioner's indictment in this case (which was already filed, but still sealed), were notified to

show up at the 77th Precinct to listen in to the 'debriefing' of petitioner. These Joint Task Force officers notified the Assistant U.S. Attorney in charge of the instant case, and for whom they were working, that they were headed to the 77th Precinct. Pursuant to his instructions, the Task Force officers took along a grand jury subpoena to serve on petitioner — to use only as a means of keeping him in town until it was decided when to arrest him on the sealed indictment. There was no actual intention to have him appear before the Grand Jury.

The two Joint Task Force officers, knowing of petitioner's sealed indictment, slipped into the room next to the one in which petitioner was being questioned by Capt. Steproe at the 77th Precinct there, they listened in to the questions and answers as petitioner went through a 4½ hour secretly tape recorded session, during which he was repeatedly discouraged from leaving. On one occasion, in order to disarm the groggy and yawning petitioner, a federal agent took over the questioning of petitioner after being falsely introduced by Capt. Steproe as a local or state police officer.

Capt. Steproe's notes of the interrogation recorded the secret 'presence' in the next room of both Joint Task Force agents aforementioned and also noted that their attendance was in relation to "Frank Mathews" — the primary named defendant in the instant indictment who had fled prior to trial. From time to time, the inquiry dealt with narcotics, the people in this 'business', and petitioner's activities in the field, as well as his knowledge of other drug dealers. It is these responses of petitioner which were admitted into evidence at the trial, over objection, and after a suppression hearing. The excerpts played for the jury arguably indicated a level of knowledge respecting drug activities and personalities in the drug trade borne of close association with narcotics traffic.

## **B. The Proofs Relating to Petitioner's Failure to File Income Tax Returns.**

Although objected to by defense counsel, the trial court allowed into evidence proof that petitioner had not filed income tax returns for the tax years of 1969 to 1974. The proofs were in the form of reports from a federal computer data bank showing that no returns had been filed for the years in question under the Social Security number belonging to petitioner. Although there was no proof on petitioner's part of large, or even moderate expenditures, taking place during the period of the alleged conspiracy, the proof of non-filing was offered and received as evidence of membership in the conspiracy to sell drugs charged in the First Count of the indictment.

## **REASONS FOR GRANTING THE WRIT**

### **I.**

**The trial court erred in refusing to suppress petitioner's statements to the police made by him after the indictment herein was filed.**

Petitioner was under indictment in the instant case (although the indictment was still sealed) when the police improperly conducted a four and one-half hour secretly tape recorded interrogation which was contemporaneously overheard by several federal and state narcotics agents interested in petitioner's narcotics activities. (*Massiah v. United States*, 377 U.S. 201; *Kirby v. Illinois*, 406 U.S. 682, 688; *McCleod v. Ohio*, 381 U.S. 356; *United States v. Hayles* [5 Cir. 1973] 471 F.2d 788; *United States v. Frank* [2 Cir.] 520 F.2d 1287, 1290-2). The opinion below does not find this procedure offensive to petitioner's rights under *Massiah v. United States*, 377 U.S. 201, because it concludes that the debriefing was not sponsored by the federal authorities and that the officers conducting the session did not know that petitioner was then under indictment.

The Court of Appeals also has concluded that petitioner's statements were made voluntarily. The panel's decision on this subject is open to question based upon various facts appearing in the opinion and other record facts to which the panel gave no notice.

The Court of Appeals' opinion is amiss because it ignores the fact that petitioner was in any extremely debilitated condition and lacking in substantial volitional capacity as a result of brutal torture and burnings at hands of his Black Muslim captors during a lengthy and harrowing captivity. Petitioner had, among other tortures, been burnt rectally by a hot stove iron. The panel opinion notes that petitioner was escorted by eight (8) police officers to the station house almost immediately after his kidnap-release. There, petitioner sought to leave several times, but was always talked out of leaving.

The Court of Appeals' opinion also overlooks the fact that the police captain in charge of petitioner's interrogation notified all federal and state drug authorities to attend the secret debriefing — knowing that petitioner's state drug case was on appeal and that the Joint Task Force was extremely interested in petitioner. Indeed, the Joint Task Force agents (state and federal) most directly responsible for petitioner's indictment in the instant case, came to the station house and listened to the interrogation in a private room wired for them by the police interrogation team which was bolstered by a federal agent falsely introduced to petitioner as a local police officer.

The tape recording of petitioner is a skillfully conducted interrogation broaching the subject of drugs on several occasions. The interrogator, a police captain, brought together a composite of narcotics enforcement personnel at every level of government — state and federal. This officer, Capt. Steproe, either knew that petitioner was indicted (because he invited the very federal and state agents who had procured petitioner's indictment in this case), or he should have known. The federal

and state officers who knew of petitioner's indictment were present in an adjoining room to overhear his interrogation and such coordinated state-federal action should not leave room for the high ranking police officer in charge of the inquiry to plead ignorance. Capt. Steproe was in a position to know of petitioner's indictment and his dubious lack of knowledge should not constitute a buffer against responsibility for putting petitioner on notice. Capt. Steproe could not constitutionally seek to remain ignorant of petitioner's indictment while dealing so closely with those who were investigating petitioner and had already procured an indictment against him. Moreover, petitioner was in a position equivalent to custody and his lack of knowledge of the fact of his indictment required that specific warnings be put to him (*Lopez v. Zelker*, 344 F.S. 1050, *aff'd.*, 465 F.2d 1405; see also dissent of Judge Friendly in *United States v. Massimo*, 432 F.2d 324, 326).

Even assuming that petitioner's post-indictment statements were voluntary under *Miranda* standards, he would have been entitled to very particularized warnings setting forth the pitfalls of self-representation, *United States v. Satterfield* (opin. of Knapp, U.S.D.J., S.D.N.Y. 7-8-76; 417 F.S. 293, 303; 19 Cr.L. Rptr. 238; *aff'd.*, 2 Cir., 12-776); see also *Lopez v. Zelker*, 344 F.S. 1050, *aff'd.*, 465 F.2d 1405.

Moreover, the panel opinion overlooks the fact that petitioner's attorney had telephoned the police relative to his client *during* the period of petitioner's kidnapping. This fact was known to Capt. Steproe who, nonetheless, made no effort to alert petitioner's attorney regarding petitioner's interrogation. Since petitioner's attorney did telephone the police *relating to the kidnapping* prior to petitioner's release by his captors, counsel was entitled to be notified of the proposed interrogation of his client. Petitioner's attorney was identifiable and known prior to the interrogation. He had already discussed the kidnapping with the police and was not in the category of "house counsel" referred to in *United States v. Masullo*, 489 F.2d 217, a case relied upon by the Court of Appeals.

Finally, any chance that petitioner had to receive a fair trial was destroyed by permitting the jury to learn that he had recently been kidnapped for a ransom by Black Muslims. The fact of the kidnapping and the ransom demand improperly stamped petitioner as a narcotics dealer. In the context of the entire case, these facts made it clear to the jury that the Muslims had selected petitioner as a hostage only because he was known, or believed to be, a 'well-heeled' narcotics seller.

## II.

**The trial court committed reversible error by allowing into evidence proof that petitioner had not filed federal tax returns. The proffer was irrelevant to the crime of narcotics conspiracy, inflammatory, and violative of petitioner's Fifth Amendment rights.**

In an effort to bolster its proofs against petitioner, the Government offered into evidence proof that he had not filed any federal income tax returns for the years from 1969 through 1974 (Tr. 6007 *et seq.*). The form of the offer was testimony from an I.R.S. clerk to the effect that a computer search of the records of the Internal Revenue Service showed no returns filed under petitioner's Social Security number for the years in question. The proof was admitted over defense counsel's repeated objection.

The discussion in the opinion of the Court of Appeals on this issue (Appendix B, 23a) is based upon the misconception that "large expenditures were made by Cameron. . . ." In writing to this mistaken effect, the Court of Appeals overlooked the fact that the trial proofs showed that over a seven (7) year period of time, petitioner spent only a paltry \$3,000; that is, less than \$500 per year. And, none of the items purchased consisted of extravagant merchandise, but rather household items and clothing. Nor did the record show that petitioner had bought or owned any expensive vehicles, such as was the case with the

other defendants. The factual foundation for the panel's discussion of petitioner's failure to file tax returns was, thus, completely distorted.

We recite the foregoing only to set straight the framework in which the panel opinion sought to deal with the question of the propriety of allowing into the record proof that petitioner did not file income tax returns from 1969 to 1974.

We do not quarrel that there is a line of cases supporting the admissibility of proof showing the sudden acquisition of large amounts of money, these large amounts being consistent with a defendant's involvement in the revenue producing criminal enterprise with which he is charged (*United States v. Tramunti*, 513 F.2d 1087, 1104; *United States v. Falley*, 489 F.2d 33). Proof of that sort was not developed against the petitioner in this case.

Petitioner was shown, however, to have failed to file income tax returns from 1969 to 1974, and from this the jury was invited to infer that the failure to file returns was indicative of implication in the crime of conspiring to deal in narcotics. Failure to file an income tax return is not an omission tending to indicate that the limited monies utilized by petitioner to live on in the years of non-reporting were derived from an illegal source — let alone one involving the drug conspiracy with which he was charged. In its opinion the Court of Appeals, however, flatly states that failure to file a return is indicative of involvement with income not legitimate in its source — and so is relevant on the issue of complicity in a drug conspiracy (Appendix B, 24a). For this bald assertion there is absolutely no basis offered except the panel's bare *ipse dixit*. In so ruling, the panel did not pin its conclusion on any criteria borne of tested experience, or otherwise subject to verification. The proposition thus advanced was completely new, and hardly suitable to implementation in criminal trials where something more than the merest suggestion of probabilities is necessary before "proofs" become operative criteria for fastening guilt upon persons otherwise presumed to be innocent.

The first misstep of the Court of Appeals was that it completely overlooked the decision of the United States Supreme Court in *United States v. Sullivan*, 274 U.S. 259. There, the Supreme Court ruled that a taxpayer may not refuse to file a tax return simply because he fears that such filing is apt to lead to disclosure of his involvement in crime. In *Sullivan*, the Supreme Court observes that the mere act of filing a tax return does not immediately carry with it an infringement of one's Fifth Amendment rights against self-incrimination. The reason for this is that the filing of the return may truthfully be crafted to avoid any disclosures which are criminal *per se*, or the return itself may be utilized to make the claim of self-incrimination. The act of filing is, however, not to be viewed as co-extensive with self-incrimination.

Since the very act of filing a return cannot be equated with incrimination under the view expressed in *Sullivan, supra*, the failure to file a return should, likewise, have no collateral criminal impact. However, the panel opinion below specifically provides that the failure to file is some proof of involvement in crime because the filing omission bespeaks the existence of income derived from criminal activity. The premise of the panel opinion on this subject is, thus, directly at odds with the rationale of the Supreme Court in the *Sullivan* case, *supra*.

The opinion of the Second Circuit also warrants concern because it permits a jury to be instructed that it may infer complicity in a narcotics conspiracy merely from the act of non-filing of a tax return. The allowance of such an inference has no experiential basis or statistical validity. As has been stated in the United States Supreme Court, in *United States v. Barnes*, 412 U.S. 837, 844:

"Common law inferences, like their statutory counterparts must satisfy due process standards in the light of present-day experience."

Numerous cases support the proposition that before an inference of ultimate criminal complicity growing out of an intermediate fact may be suggested to a jury, there must be a valid and rational basis supporting the hypothesis (*Tot v. United States*, 319 U.S. 463, 467; *United States v. Gainey*, 380 U.S. 63; *Turner v. United States*, 396 U.S. 398; *Leary v. United States*, 395 U.S. 6; *United States v. Romano*, 382 U.S. 136). Failure to file tax returns is not an uncommon phenomenon. Highly placed persons in government and industry (i.e., president of N.B.C.) are known to be non-filers. It is pure speculation to equate non-filing with membership in a drug conspiracy and to allow the fact of non-filing to act as a substitute for conspiratorial proof.

While petitioner's failure to file tax returns may involve a decision on his part to stand mute before the Internal Revenue Service, such silence should not be a basis for inferring criminality on his part for crimes *other than* the failure to file a tax return (see *Griffin v. California*, 380 U.S. 609; *United States v. Hale*, 422 U.S. 171; *Johnson v. United States*, 318 U.S. 184; *Grunewald v. United States*, 353 U.S. 397; *Shepherd v. United States*, 290 U.S. 96, 104).

The rule endorsed by the opinion of the Court of Appeals is novel and threatens to engulf defendants in all manner of cases, both criminal and civil. Proof of one crime (non-filing) should not be admissible as proof of an altogether different charge or claim where there is no rational nexus for making the desired assumptions.

### CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

s/ Lawrence K. Feitell  
Attorney for Petitioner

### APPENDIX A

## JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

UNITED STATES COURT OF APPEALS  
SECOND CIRCUIT

FILED SEPTEMBER 27, 1976  
A. DANIEL FUSARO, CLERK

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the twenty-seventh day of September, one thousand nine hundred and seventy-six.

Present:

HON. STERRY R. WATERMAN

HON. PAUL R. HAYS

HON. THOMAS J. MESKILL

Circuit Judges,

76-1024 75-1402

75-1418 75-1441

75-1443 75-1444

75-1442 75-1445

United States of America,

Plaintiff-Appellee,

v.

*Appendix A*

Frank Matthews, a/k/a "Pee Wee", "Big Book", "Frank McNeil", "Mark IV Frank", Barbara Hinton, a/k/a "Barbara Matthews", Gattis Hinton, a/k/a "Bud", "Slim", "Joseph Jackson", William Beckwith, a/k/a "Mickey", "McGill", "Miguel", Donald Conner, Robert Currington, a/k/a "Pedro", Charles William Cameron, a/k/a "Swayzie", James Wesley Carter, a/k/a "Brother Carter", "Big Head Brother", "Big B", John Darby a/k/a "Pop", "John Smith", Thelma Darby, a/k/a "Flossie", "Thelma Reese", David Clement Bates, a/k/a "Rev. Walter Rosenbaum, Ernest Robinson, a/k/a "Ernie", James E. Martinez, Scarvey McCargo, Fred Brown, Lucy Mathews, Marzella Steele Webb,

Defendants,

Barbara Hinton, a/k/a "Barbara Matthews", William Beckwith, a/k/a "Mickey", "McGill", "Miguel", James Wesley Carter, a/k/a "Brother Carter", "Big Head Brother", "Big B", Scarvey McCargo, Charles William Cameron, a/k/a "Swayzie", John Darby, a/k/a "Pop", "John Smith", Thelma Darby, a/k/a "Flossie", "Thelma Reese", David Clement Bates, a/k/a "Rev.",

Defendants-Appellants.

Appeal from the United States District Court for the Eastern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Eastern District of New York, and was argued by counsel.

*Appendix A*

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgments of said District Court be and they hereby are affirmed except as to appellant Barbara Hinton, the said judgment be and it hereby is reversed and that the action as to Barbara Hinton be and it hereby is remanded to said District Court for further proceedings in accordance with the opinion of this court.

A. DANIEL FUSARO  
Clerk

by  
Vincent A. Carlin  
Chief Deputy Clerk

## APPENDIX B

OPINION OF THE COURT OF APPEALS  
UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT

Nos. 1018, 1019, 1023,  
1062-1065, 1390—September Term, 1975.

(Argued July 19, 1976 Decided September 27, 1976).

Docket Nos. 75-1402, 75-1418, 75-1441-75-1445, 76-1024

UNITED STATES OF AMERICA,  
*Plaintiff-Appellee,*

v.

BARBARA HINTON, WILLIAM BECKWITH, CHARLES  
WILLIAM CAMERON, JAMES W. CARTER, JOHN DARBY,  
THELMA DARBY, DAVID BATES and SCARVEY MCCARGO,  
*Defendants-Appellants.*

Before:

WATERMAN, HAYS and MESKILL,  
*Circuit Judges.*

Appellants were all charged in one indictment and were convicted after jury trial in the Eastern District of New York, Mishler, *Ch. J.*, of having conspired to violate the federal narcotics laws, 21 U.S.C. §§812, 841(a)(1), 846, 960(a)(1) and 963; and four of the eight, Barbara Hinton, William Beckwith, John Darby, and David Bates, were also convicted of violating 21 U.S.C. §843(b) through the use of the telephone in furtherance of the objectives of the conspiracy. Upon their several appeals all the convictions, save that of Barbara Hinton, are affirmed. The conviction of Barbara Hinton is reversed and the indictment, as to her, is ordered dismissed.

## Appendix B

JOEL A. BRENNER, New York, N.Y. (Gino E. Gallina, New York, N.Y., on the brief), *for Defendant-Appellant Hinton.*

IRVING J. BISHOP, Brooklyn, N.Y., *for Defendant-Appellant Beckwith.*

LAWRENCE K. FEITELL, New York, N.Y. *for Defendant-Appellant Cameron.*

JOSEPH I. STONE, New York, N.Y., *for Defendant-Appellant Carter.*

JEFFREY C. HOFFMAN, New York, N.Y. *for Defendant-Appellant John Darby.*

LESLIE A. BLAU, New York, N.Y., *for Defendant-Appellant Thelma Darby.*

HAROLD R. VENOKUR, Brooklyn, N.Y. *for Defendant-Appellant Bates.*

GARY R. SUNDEN, New York, N.Y., *for Defendant-Appellant McCargo.*

PAUL A. DEPETRIS, Assistant U.S. Attorney (David G. Trager, U.S. Attorney, Eastern District of New York, Paul B. Bergman and Alvin A. Schall, Assistant U.S. Attorneys, on the brief), *for Plaintiff-Appellee.*

WATERMAN, *Circuit Judge:*

Following a ten week jury trial in the United States District Court for the Eastern District of New York, appellants Barbara Hinton, William Beckwith, James Carter, David Bates, Scarvey McCargo, Charles Cameron, John Darby, and Thelma Darby were convicted of conspiracy to violate the federal narcotics laws, 21 U.S.C.

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§§812, 841(a)(1), 846, 960(a)(1) and 963. Four of them, Hinton, Beckwith, John Darby, and Bates, were also convicted of using the telephone to further the conspiracy, 21 U.S.C. §843(b). In support of their prayers for reversal, appellants raise a plethora of claims; but, save one raised by Barbara Hinton as set forth below, we find these claims to lack merit. Accordingly, we affirm all of the convictions except the conviction of Barbara Hinton.

## I. FACTS

Appellants, and ten other co-defendants, were charged in Count One of an indictment filed January 29, 1975, with conspiring between September, 1968, and January, 1975, to import into the United States, and to distribute and possess with intent to distribute, substantial quantities of heroin and cocaine. In Counts Two through Nine of the indictment, many, though not all, of the defendants were separately charged with using the telephone to further the conspiracy charged in Count One.<sup>1</sup>

Two defendants pleaded guilty prior to trial.<sup>2</sup> Three other defendants, including Frank Matthews, the kingpin of the narcotics operation, were, and still are, fugitives.<sup>3</sup> Of the remaining thirteen defendants who proceeded to trial before Chief Judge Mishler, five were acquitted by the jury.<sup>4</sup> The eight convicted at trial, all of whom now

<sup>1</sup> Hinton was so charged in two counts, Beckwith in five counts, John Darby in five counts, Bates in two counts, Thelma Darby in one count, and Matthews in six counts.

<sup>2</sup> Donald Conner and Walter Rosenbaum. Conner pleaded guilty to the conspiracy charge and was sentenced to ten years imprisonment, a special parole term of five years, and a \$10,000 fine. Rosenbaum, who testified as a Government witness, pleaded guilty to a superseding information charging a violation of 21 U.S.C. §843(b); and the court suspended the imposition of sentence, imposing a three year term of probation. The underlying conspiracy charge was dismissed.

<sup>3</sup> Gattis Hinton and Fred Brown are the two others yet at large.

<sup>4</sup> Robert Currington, Ernest Robinson, James E. Martinez, Lucy

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appeal their convictions, were each sentenced to at least two years imprisonment;<sup>5</sup> and, except for John Darby and Carter, they have all been released pending appeal.

No elaborate recitation of the rather extensive facts need be given in order to construct a backdrop for the arguments appellants have raised. In essence, the Government's proof at trial established the existence of a large narcotics conspiracy operating from 1968 through 1975, with the not uncommon structure of receivers, distributors, couriers for sub-organizations, and suppliers of diluents used in the "cutting" of narcotics.

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Matthews, and Marzella Steele Webb, named in the conspiracy count, were so acquitted.

- 5 The judgments of conviction, and the sentences imposed, were entered against the appellants as follows:

*Barbara Hinton* - convicted on conspiracy count and on one telephone count; acquitted on second telephone count. Sentenced to two years imprisonment and a three year special parole term on Count 1; to a concurrent two year term of imprisonment on the telephone count.

*William Beckwith* - convicted on conspiracy count and one telephone count. Sentenced to fifteen years imprisonment, a special ten year parole term, and a \$25,000 fine on Count One; to a concurrent four year prison term on the telephone count.

*James W. Carter* - convicted on conspiracy count. Sentenced to fifteen years imprisonment and a five year special parole term.

*Scarvey McCargo* - convicted on conspiracy count. Sentenced to five years imprisonment and a five year special parole term.

*Charles W. Cameron* - convicted on conspiracy count. Sentenced to eight years imprisonment, a five year special parole term, and a \$5,000 fine.

*John Darby* - convicted on conspiracy count and five telephone counts. Sentenced on Count One to fifteen years imprisonment, a five year special parole term, and a \$25,000 fine; on Counts Four through Eight, to three years imprisonment, each consecutive to each other, but concurrent to Count One.

*Thelma Darby* - convicted on conspiracy count; acquitted on telephone count. Sentenced to five years imprisonment, a five year special parole term, and a \$25,000 fine.

*David C. Bates* - convicted on conspiracy count and on one telephone count; acquitted of one telephone count. Sentenced to eight years imprisonment, a special parole term of five years, and a \$5,000 fine on Count One; to a concurrent four year prison term on the telephone count.

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Frank Matthews, common-law husband of appellant Hinton, occupied a central position in the operation; and it was he who principally orchestrated the importation of drugs from connections abroad, largely from Venezuela. The drugs were then diluted and packaged at one of the organization's drug "mills," such as the apartment located at 925 Prospect Street, Brooklyn, nicknamed the "Ponderosa," and were thereafter distributed by organization lieutenants and other connections in Maryland, Pennsylvania, Ohio, New York, North Carolina, and other United States locations. McCargo, a Matthews lieutenant, worked principally at the "Ponderosa," cutting and bagging narcotics. Carter, an upper-level receiver of narcotics from the organization, acted as the major distributor in Maryland, utilizing a sub-cadre of couriers and connections in that state. For instance, in late 1970, there was a shortage of heroin in Maryland; and several of Carter's people met to discuss the problem. Purcel Wylie, a Carter courier, told one of Carter's customers, Norman Coleman, that Frank Matthews was Carter's connection and that to obtain a supply of narcotics he was to call a phone number in New York to contact Matthews' wife, Hinton, and that she would connect Wylie with one of the organization's lieutenants who would supply the heroin.

John Darby, a key lieutenant in the organization, supervised the distribution of narcotics in Pennsylvania. After Darby was arrested in September, 1972, and later was sentenced on a state "gun" charge to imprisonment in New York, his wife, appellant Thelma Darby, assumed his functions in the organization. In 1974, in particular, she had frequent contact with Walter Rosenbaum, who supplied the organization with mannitol and quinine used in cutting narcotics. Bates and Cameron, major receivers of narcotics from the Matthews organization, distributed in Pennsylvania and North Carolina, respectively. Beck-

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with acted as one of Matthews' lieutenants, assisting in the acquisition of diluents through Rosenbaum and other contacts. There was also evidence that Beckwith owned one of the organization's "cutting mills," an apartment at 101 E. 56th Street, Brooklyn, from which, among other things, a 32-gallon drum and oar used to cut and mix heroin, sifters, spoons, and other "cutting" paraphernalia, cases of quinine, various quantities of heroin and cocaine, and approximately \$148,000 in cash were seized on September 15, 1972, during a search incident to a valid warrant.

Investigation by federal and state narcotics agents of the Matthews organization commenced in 1971, apparently as a result of the observations of one Detective Kowalski of the New York City Police Department, who lived at 130 Clarkson Avenue, Brooklyn, a building in which Matthews and Hinton also maintained an apartment. In 1971 and 1972, Kowalski observed several of the appellants, including Hinton, John and Thelma Darby, McCargo, and Cameron, frequently entering and leaving the apartment; and, on occasion, he observed them carrying paper bags, attache cases, and suitcases. Kowalski's observations triggered surveillance by federal and state authorities of the comings and goings of Matthews and other organization members from other locations utilized by the organization, including 3333 Henry Hudson Parkway, Bronx. In 1972, surveillance was greatly increased; and in June and August of that year, two court-ordered wiretaps were obtained for the 3333 Henry Hudson Parkway apartment and for 7 Buttonwood Road, Toad Hill, Staten Island, a large residence built by Matthews and Hinton. A September, 1972, search of the 130 Clarkson Avenue apartment followed shortly thereafter; and various documents were turned up which concerned money received from nar-

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cotics purchasers and disclosed some of the expenditures made by the organization.

The arrest of various organization members in 1972 and 1973, such as that of Norman Coleman in March, 1972, and their agreements to cooperate with the Government, assisted federal and state authorities in pursuing the already extensive investigation underway. In January, 1973, Frank Matthews was arrested in Las Vegas, Nevada. His arrest, and the organization's efforts directed at meeting his \$325,000 bail bond, reduced from an initial \$5,000,000, threw the organization into temporary disarray. Following the posting of the bond, Matthews "jumped" bail; and he has since been at large. After Rosenbaum's arrest and agreement to cooperate with the Government in June, 1973, undercover agents began to infiltrate the organization, posing at times as prospective suppliers of the then scarce diluents quinine and mannitol. Organization narcotics sales nonetheless continued through early 1975.

## II. THE INDICTMENT OF BARBARA HINTON

Appellant Hinton raises seven points of error, one of which is of importance and is discussed forthwith. She claims that her indictment by the same grand jury which heard her give immunized testimony constitutes a violation of her Fifth Amendment rights and her right to due process, and that, accordingly, as to her, the indictment must be dismissed and her conviction after having been tried upon that indictment must be reversed.

The grand jury which returned the instant indictment was convened in June, 1972. On November 21, 1972, Hinton appeared before that grand jury for the first time. After giving some 20 pages of testimony, during which she claimed her privilege against self-incrimination as to nearly all questions not pertaining to her "pedigree," she

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was excused. The Government subsequently sought an order granting Hinton immunity; and on February 16, 1973, the late Judge George Rosling of the U.S. District Court, Eastern District of New York, signed such an order. On February 20, 1973, Hinton was recalled to testify; but she persisted in claiming her privilege and was shortly thereafter excused, apparently to enable the prosecutor and her attorney to discuss the immunity issue. She was then recalled on both February 21 and March 7, 1973, during which appearances she gave approximately 200 pages of testimony. Two years later, this same grand jury, the grand jury which had heard her immunized testimony, indicted her; and she stood trial on the allegations contained in that indictment.

At trial, Hinton's counsel moved at least three times for a dismissal of the indictment, or, in the alternative, for a hearing on the issue of whether the indictment had been tainted by the improper use of her immunized testimony. Judge Mishler did not dismiss the indictment, and at first declined to grant the alternative request for a hearing; but he stated that he would examine the grand jury minutes to ascertain whether an independent source existed for the evidence upon which the indictment was founded. Later, upon a renewed motion, the court stated that "[i]f the defendant is convicted I will give you a full hearing." However, when counsel, after the Government had rested, again moved for a hearing, the judge, stating that he had decided against Hinton's petition, retracted his earlier commitment.<sup>6</sup>

<sup>6</sup> Judge Mishler concluded that there was no need for a hearing as "there is no question in my mind that the Government used none of the testimony that she gave before the grand jury." There is no evidence in the record, however, that the Government was ever required to affirmatively establish that the indictment was based on evidence fully independent of Hinton's testimony.

Judge Mishler further concluded, in agreement with the Government's

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Hinton contends that, as to her, the indictment was necessarily tainted by the grand jury's having heard her immunized testimony; and thus that she has suffered an unconstitutional deprivation of her privilege against self-incrimination. She further contends that, inasmuch as the Government was never required to show that it had an independent source for the evidence which formed the basis of her indictment, the trial court's refusal to conduct a hearing on the issue of taint constitutes reversible error. The Government counters that the evidence underlying Hinton's indictment was obtained or derived from an independent source because: (1) Hinton's testimony was entirely self-exculpatory; (2) she was indicted nearly two years after giving her immunized testimony; and (3) the evidence incriminating Hinton came primarily from one Donald James, who testified before the grand jury prior to Hinton, and also came from the wiretaps conducted in June through September, 1972.

At first glance, it would seem that where the indictment is returned by the same grand jury which heard the defendant's immunized testimony, it would be virtually impossible for the Government to show that it had an independent source for the indictment's evidentiary base as "[d]espite any instructions from the judge, it would be well nigh impossible for the grand jurors to put [the immunized witness's] answers out of their minds, cf. *Bruton v. United States*, 391 U.S. 123 (1968). . . ." *Goldberg v. United States*, 472 F.2d 513, 516 (2d Cir.

position, that the necessity for permitting the same grand jury to indict Hinton that had heard Hinton's immunized testimony was occasioned by the fact that the grand jury's term extended from 1972-1975 during which so many witnesses were heard in connection with this conspiracy that "it's very likely that some of the witnesses who appeared before the Grand Jury, some of them might be targets, and were also indicted by the Grand Jury. It seems like a needless process, to just hear the entire testimony and hand it over to [a new] Grand Jury for indictment."

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1973).<sup>7</sup>

Here, however, the issue is complicated by the Government's assertions, assertions emphasized by the trial court, that, in fact, Hinton gave no incriminating testimony before the grand jury, and that she did not admit any knowing involvement in the facts and circumstances later charged in the indictment against her. From this, the Government contends in its brief that Hinton's testimony was not necessary to form a factual predicate for her indictment. The Assistant United States Attorney did admit at oral argument, however, that it was not until after Hinton's own testimony that he realized the extent of her involvement. Further, the Government argues that Hinton's denial of any involvement in the narcotics operation the grand jury was studying left her in the same position as if she had claimed the Fifth Amendment privilege.

Analysis must begin with 18 U.S.C. §6002, the immunity statute. It provides, in relevant part, that:

<sup>7</sup> It has been suggested, however, that this dictum from Judge Friendly's opinion in *Goldberg* has been overruled by *United States v. Calandra*, 414 U.S. 338 (1974). *United States v. Dornau*, 491 F.2d 473, 481 n.15 (2d Cir. 1974). This suggestion is based on the dictum in *Calandra*, *supra*, at 345, that "an indictment valid on its face is not subject to challenge on the ground that the grand jury acted . . . on the basis of information obtained in violation of a defendant's Fifth Amendment privilege against self-incrimination," citing *Lawn v. United States*, 355 U.S. 339 (1958). We agree with appellant Hinton that the *Dornau* suggestion is suspect, inasmuch as the *Goldberg* panel considered *Lawn* and concluded that that decision did not settle the question, 472 F.2d at 516 n.4, a viewpoint which we share. *Lawn* involved two successive grand juries, the first of which heard defendants' testimony and received their records, and the second of which returned the indictment upon which they were tried. In direct contrast to the instant case, the defendants in *Lawn* "had no reason, beyond suspicion, to believe that the [second] grand jury considered any of the materials produced by petitioners before the [first] grand jury." 355 U.S. at 348-49. Where the grand jury which hears the witness's testimony and the grand jury which indicts is the same grand jury, as here, consideration of the immunized testimony by that jury is a virtual certainty.

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[N]o testimony or other information compelled under the order [granting immunity] (or any information directly or indirectly derived from such testimony or other information) may be used against the witness in any criminal case, except a prosecution for perjury, giving a false statement, or otherwise failing to comply with the order.

The question here is whether any of Hinton's immunized testimony, or any information directly or indirectly derived from that testimony, was used against her in her prosecution. In *Kastigar v. United States*, 406 U.S. 441 (1972), in upholding the constitutionality of §6002, the Court stated that once a defendant demonstrates that he has testified under immunity to matters relating to the federal prosecution, the prosecution has "the affirmative duty to prove that the evidence it proposes to use is derived from a legitimate source wholly independent of the compelled testimony." 406 U.S. at 460. As we have previously emphasized, the burden imposed by *Kastigar* requires not merely a showing by the Government that the immunized testimony was not the indictment's "legal cause"; rather the prosecution must establish that the legitimate evidence upon which the indictment was founded was gleaned from a source "wholly independent of the compelled testimony." *United States v. Kurzer*, 534 F.2d 511, 516 (2d Cir. 1976).

The cases since *Kastigar* in which appellate courts were faced with the claim that evidence was improperly derived from immunized testimony, or that the immunized testimony was itself improperly used, are of little assistance in resolving the question here. None of them involved the situation where the same grand jury which heard a witness's testimony returned an indictment against that witness based upon facts about which the

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witness testified.<sup>8</sup> It is clear from these subsequent cases, however, that the fact that none of Hinton's immunized testimony was introduced at the trial does not resolve the question, for §6002 speaks of *any* use of the immunized testimony against the witness in any criminal case, and so prohibits its use not merely at trial, but in the grand jury proceedings as well. *United States v. Kurzer*, *supra*; cf. *Kirby v. Illinois*, 406 U.S. 682, 688-9 (1972).

We cannot agree with the trial judge that the Government has satisfied its burden of demonstrating a "wholly independent" source for the evidence upon which Hinton's indictment was grounded. Even if Hinton in her testimony before the grand jury substantially denied any involvement in the conspiracy, that denial does not preclude the possibility of improper use against her of her testimony. A juror can draw an inference of a witness's guilt from either a confirmation of, or a denial of participation in, acts about which he is questioned. For instance, if witness X denies involvement in a situation in which one or several other witnesses have already confirmed X's participation, the jurors could reasonably draw an inference that X had not truthfully testified about the incident. Distrust of his testimony on that one point could reasonably lead the jurors to distrust all or a large part of X's testimony on other matters. If witness X had kept silent, or had been permitted to assert his Fifth Amendment privilege, those negative inferences would

<sup>8</sup> *United States v. Kurzer*, 534 F.2d 511 (2d Cir. 1976); *United States v. Bianco*, 534 F.2d 501, 510-11 (2d Cir. 1976); *United States v. DeDiego*, 511 F.2d 818 (D.C. Cir. 1975); *United States v. First Western State Bank of Minot, North Dakota*, 491 F.2d 780 (8th Cir.), cert. denied sub nom. *Thompson v. United States*, 419 U.S. 825 (1974); *United States v. Catalano*, 491 F.2d 268, 272 (2d Cir.), cert. denied, 419 U.S. 825 (1974); *United States v. McDaniel*, 449 F.2d 832 (8th Cir.), on remand, 352 F. Supp. 585 (D. N.Dak. 1972), aff'd, 482 F.2d 305 (8th Cir. 1973). See also *United States v. Dornau*, 359 F. Supp. 684 (S.D.N.Y. 1973), rev'd on other grounds, 491 F.2d 473 (2d Cir.), cert. denied, 419 U.S. 872 (1974).

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have been precluded.

We are thus unpersuaded by the Government's contention that the evidentiary basis for the indictment of Hinton was derived *in toto* from the testimony of Donald James and the wiretaps. While that evidence may have been incriminating, it is difficult, if not impossible, to determine, without questioning the grand jurors themselves, whether, standing alone, it would have justified the indictment of Hinton. The Government found it necessary to call Hinton under grant of immunity after James had testified, and this would tend to indicate his testimony was not sufficient to inculcate her, and the jurors needed to have her face them before deciding to indict.

The fact that Hinton was indicted some two years after she testified also fails to negate the existence of taint. As she notes, we have no information as to whether her testimony was later reread to, or summarized for, the grand jury, or whether any leads or other information were derived from her testimony that were later used by the Government in obtaining evidence to influence the grand jury's decision whether to indict her. This Government argument that the lapse of time cleanses taint borders on the frivolous: there was but one indictment, and it was returned against all of the defendants when the grand jury had completed its four-year studies. Likewise, the Government's final argument is also particularly unconvincing; to wit, that it would have been too costly and time-consuming to convene a new grand jury to indict Hinton inasmuch as the original grand jury had heard scores of witnesses during its four-year term.

Thus we conclude that there has been no compliance with the *Kastigar* requirement that the Government must affirmatively prove that the evidence against Hinton was derived from a wholly independent source; but we are now faced with the equally important issue of whether a

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hearing to ascertain whether the immunized testimony was improperly used is a fit remedy to be applied here. We are convinced that such a hearing on the question of taint would not suffice. Beyond the foreseeable difficulties of establishing at a hearing that the grand jurors, when they decided to indict, did not improperly use the immunized testimony or leads or evidence derived from it, for us to condone the practice of having the same grand jury that heard the immunized testimony indict the witness who so testified<sup>9</sup> is to invite action where the cure is worse than the malady. The prospect of peering into the grand jurors' minds, or of examining them individually, to ascertain whether Hinton's testimony was improperly used, is both impractical and unpalatable.<sup>10</sup> To so defile the secrecy of the grand jury process in order to inquire into apparent slipshod prosecutorial practices is to compound the problem the Government has created, rather than to alleviate it. The alternative of convening a grand jury distinct from that which heard the immunized testimony is not so onerous as to justify the jeopardizing of a defendant's Fifth Amendment rights. To hold otherwise is to permit intrusion into the long-approved common law

9 Of Course the right of any grand jury to consider (18 U.S.C. §6002) "a prosecution for perjury, giving a false statement, or otherwise failing to comply with the order [granting immunity]" is not involved in this appeal in any way.

10 The apparent necessity for examining the grand jurors themselves at a hearing to determine whether any of the immunized testimony was improperly used against the defendant does not pertain in those cases where the question is whether an illegitimate use was made by a subsequent, entirely separate grand jury or at the trial of the defendant. In those cases, exploration of the question of taint can be made through examination of the defendant, the witnesses for the prosecution, and the witnesses whose testimony incriminated the defendants, *see, e.g., United States v. Kurzer*, 534 F.2d at 515-518, and by review of the prosecution's evidence and of the grand jury transcript, *see, e.g., United States v. Bianco*, 534 F.2d at 509-11; *United States v. First Western State Bank of Minot, North Dakota*, 491 F.2d at 786-788.

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secrecy of the grand jury process.

We believe that as a matter of fundamental fairness, a Government practice of using the same grand jury that heard the immunized testimony of a witness to indict him after he testifies, charging him with criminal participation in the matters being studied by the grand jury, cannot be countenanced. The procedure is so fraught with applicable constitutional problems and with the potential for abuse that in our supervisory power over the administration of criminal justice in the district courts of this circuit, *cf. United States v. Toscanino*, 500 F.2d 267 (2d Cir. 1974), we are compelled to conclude that the procedure the Government adopted here falls outside the bounds of permissible prosecutorial conduct. Accordingly, we reverse the conviction of appellant Hinton and instruct that the indictment be dismissed as to her.<sup>11</sup>

## III. THE WIRETAPS

Appellants John Darby, Cameron, Hinton, Bates, and Thelma Darby<sup>12</sup> argue that the trial court erred in denying a pre-trial motion to suppress evidence obtained pursuant to two state wiretap orders. The first order, dated June 27, 1972, and signed by Justice William Kapelman of the New York Supreme Court, Bronx County, authorized interception of the narcotics-related conversations of Matthews, Hinton, John Darby, Carter, and others, over the telephone bearing the number 212-884-2043, located in Matthews' apartment at 3333

<sup>11</sup> Having thus reversed her conviction by upholding her second claim of error, we need not reach the six additional arguments advanced by Hinton in support of reversal.

<sup>12</sup> The appellants have standing to challenge the validity of the wiretap order since they are persons whose conversations were intercepted or against whom the interception was directed. N.Y. Crim. P. L. §§710.20 and 710.10(5.) and N.Y.C.P.L.R. §4506(2.). See also 18 U.S.C. §§2510(11) and 2518(10)(a).

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Henry Hudson Parkway. The order was extended once and expired August 24, 1972. The second order, dated August 24, 1972, and signed by Justice Samuel Rabin of the New York State Appellate Division, Second Judicial Department, authorized the interception of Matthews' conversations over the telephone bearing the number 212-979-4022, located in his residence at 7 Buttonwood Lane, Staten Island. Both orders contained provisions requiring minimization of interception of calls unrelated to the narcotics investigation.

Appellants claim that the evidence derived from the wiretap surveillance should have been suppressed as: (1) the Government failed to show as a prerequisite for the interception orders that normal investigative techniques would not suffice to unearth conspiracy; and (2) Government agents failed to minimize the interception of communications. As the wiretap orders were issued pursuant to New York law (N.Y. Crim. Proc. L. §§700.15(4) and 700.20(2)) and the surveillance was conducted pursuant to those state statutes, the validity of the orders must be determined under state law. The equivalent federal statutes (18 U.S.C. §2510 *et seq.*) and relevant federal decisional law may, however, be considered where there is inadequate state case law on a particular point. *United States v. Manfredi*, 488 F.2d 588, 599 (2d Cir. 1973), *cert. denied*, 417 U.S. 936 (1974); *People v. Castania*, 73 Misc.2d 166, 340 N.Y.S.2d 829, 833-36 (Monroe Cty. Ct. 1973).

Section 700.15(4) provides that an eavesdropping warrant may issue only "[u]pon a showing that normal investigative procedures have been tried and have failed, or reasonably appear to be unlikely to succeed if tried, or to be too dangerous to employ." Section 700.20(2)(d) supplements the above provision by requiring that every application for a wiretap warrant must contain a full and

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complete statement of facts establishing that normal investigative procedures have been tried and have failed, or that they reasonably appear to be unlikely to succeed if tried, or to be too dangerous to utilize. We agree with Judge Mishler that the affidavits submitted to the state courts in support of the wiretap application adequately established that normal investigative techniques would be unavailing, and that they thus complied with the mandates of §§700.15(4) and 700.20(2).

Judge Mishler noted that the purpose of the statutory requirements is not to preclude resort to electronic surveillance until after all other possible means of investigation have been exhausted by investigative agents; rather, they only require that the agents inform the authorizing judicial officer of the nature and progress of the investigation and of the difficulties inherent in the use of normal law enforcement methods. *Cf. People v. Holder*, 69 Misc.2d 863, 331 N.Y.S.2d 557 (S.C. Nassau Cty. 1972). Here, the affidavits submitted to the state courts by Officer Garay and Detective Nannery indicated that a rather extensive investigation to Frank Matthews and a number of his cohorts was already underway; but, as appellants suggest was the situation, the case against the co-conspirators was far from "airtight." The affidavits further indicate, based on ongoing non-wiretap surveillance, that Matthews was very likely involved in an expansive narcotics operation, and that he was using the telephone to further this enterprise. Use of normal investigative techniques had become increasingly unsuccessful, the affiants stated, as Matthews had become more and more evasive and had been changing his phone numbers and his phone usage. Thus, even though state or federal officers may have garnered sufficient information without the use of wiretaps to support an indictment against Matthews, and possibly against a few others,

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there was every reason to believe that additional co-conspirators were involved who could not be successfully investigated without wiretapping. The order instituting wiretapping was thus not in error.

With reference to appellants' claim that the agents conducting the wiretaps failed to minimize interception in accordance with statutory requirements and the specific language of the wiretap orders themselves, we also agree with Judge Mishler that appellants' arguments must fail.<sup>13</sup> Section 700.30, N.Y. Crim. P. L., requires in paragraph 7 that every eavesdropping warrant contain a provision that interception "shall be conducted in such a way as to minimize the interception of [non-pertinent] communications. . . ." In determining whether the agents have complied with this requirement, a requirement included in the wiretap orders, neither the New York courts nor the courts of the circuit have applied a precise, mechanical standard. We must look to whether the agents devised a reasonable means of limiting interception, and to whether they utilized those safeguards in good faith. *See People v. Holder, supra*, at 562; *United States v. Manfredi, supra*, at 600; *United States v. Tortorello*, 480 F.2d 764 (2d Cir.), *cert. denied*, 414 U.S. 866 (1973).

The Government submitted to Judge Mishler affidavits of the agents who executed the wiretapping. The agents stated that, although all calls were monitored, as soon as a call was determined to be personal in nature, the recording equipment was deactivated, and only "spot

<sup>13</sup> It should be noted that it is doubtful that any of the appellants, aside from Hinton, even has standing to challenge minimization; and she may only have standing to challenge the wiretap at her residence on Staten Island. The Bronx apartment was apparently not used as a residence by any of the appellants. *See, e.g., United States v. Poeta*, 455 F.2d 117, 122 (2d Cir.), *cert. denied*, 406 U.S. 948 (1972) (only those persons who have a privacy interest in the residence in which the tapped phone is located have standing).

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checks" were thereafter made to insure that the conversation did not turn to the subject of narcotics. It has been previously held that the mere fact that every conversation is monitored does not of necessity render the surveillance violative of the minimization requirement, *see, e.g., United States v. Bynum*, 485 F.2d 490, 500 (2d Cir. 1973), *vacated on other grounds*, 417 U.S. 903 (1974), *later reinstated*, 513 F.2d 533 (2d Cir. 1975), and cases cited therein. And this is not a case where every conversation coming into and emanating from the wiretapped residences was recorded and overheard in its entirety, as in *People v. Holder, supra*, at 570. The agents stated below in their affidavits that they utilized a maximum of five minutes to ascertain whether a conversation was pertinent to their investigation or was a distinctly personal one. While a five-minute ascertainment period is somewhat long (*compare United States v. Bynum, supra*), it was pointed out by the agents that the identification of types of calls was particularly difficult because of the conspirators' frequent use of code language when talking about narcotics, and because many calls which seemed at the outset to involve purely personal matters later turned out to be narcotics related. Here, as in *Bynum* and *Manfredi*, there was no way to frame screening instructions so as to avoid the taping of some "innocent" conversations. The calls were carefully catalogued, and those catalogues are discussed in some depth by Judge Mishler. We share his view that while it may be fairly said that the agents did not strictly adhere to the minimization instructions, it appears that a good faith attempt was made to limit intrusion into private intimacies so as to preserve the privacy interests of those whose conversations were monitored. Judge Mishler thus properly refused to suppress the wiretap evidence.

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## IV. OTHER ARGUMENTS

McCargo and Cameron contend that the trial court erred in admitting into evidence proof that they failed to file any federal income tax returns during the years 1968-1974. They argue first that the admission of the returns was based upon Rule 404(b), F. R. of Evid., which pertains to admission into evidence, for limited purposes, of proof of other crimes, and that evidence should have been excluded as its prejudicial effect outweighed its probative value.

It is quite apparent from the trial transcript, however, that the evidence of failure to file tax returns was not admitted under Rule 404(b); but the proof was offered and was admitted as a corollary to the Government's presentation of evidence regarding large expenditures made by Cameron and McCargo during several of the years in question; and the Government's purpose was to negate the existence of any legitimate source for the money they had expended. The court so charged the jury as to the evidentiary use of the returns and explained that the jurors could in their discretion infer from the appellants' failure to file returns that they had no bona fide source of income upon which they could have drawn to make their large purchases.

Cameron and McCargo argue, however, that evidence of their failure to file is not probative of the fact for which it was offered—to show the absence of any legitimate income source. In *United States v. Falley*, 489 F.2d 33, 38-39 (2d Cir. 1973), we sustained, as tending to show the lack of any legal source of income, the admissibility of tax returns on which the defendants had reported very low income. Appellants contend that *Falley* is inapposite, arguing that the failure to file any returns at all, in contrast to the reporting of low income, could be the result

## Appendix B

of any number of non-comparable factors, and thus admissibility in *Falley* does not preclude rejection here.

We are not persuaded by this argument. While proof of non-filing in concededly of less probative force than a tax return showing minimal income, there can be little doubt that it does tend to negate the existence of a legitimate source of income. It is hardly conclusive, but it is undeniably relevant. The determination of the weight which might properly be accorded it was for the jury's determination, and they were so instructed. Appellants were free to rebut this evidence with proof that they had sufficient prior net worth to fund the expenditures they had made, or that they obtained the necessary funds through non-reportable, non-taxable sources, but they apparently offered no such explanations. We agree with Judge Mishler that the probative value of the evidence outweighed any incidental prejudice, and we uphold the propriety of his ruling admitting the evidence.

Appellant Thelma Darby claims that she was irreparably prejudiced by the court's failure to grant her a severance.<sup>14</sup> This prejudice allegedly arose from the fact that she and her husband were tried together. She argues that she was prohibited from introducing evidence explaining that the reason she made frequent trips to New York in 1974-75 from her home in Philadelphia was to visit her husband who was then incarcerated in a New York state prison, and not for the reason suggested by the Government, that she traveled on narcotics business.

This claim is disingenuous. It is clear from the trial transcript that while the court instructed both the

<sup>14</sup> There is some question as to whether a timely motion for severance was ever made by Mrs. Darby below. She contends that while such a motion may not have been formally made on her behalf, Judge Mishler considered her to have joined in the severance motions voiced by three of her co-defendants. The Government sharply disputes this contention, and the relevant portion of the transcripts does not resolve the controversy.

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Government and several of the defense counsel to avoid elicitation of testimony regarding John Darby's incarceration, Judge Mishler explicitly told Thelma Darby's trial counsel that he was free to present evidence before the jury that Mrs. Darby journeyed to New York for the purpose of visiting her husband. Once given this green light, defense trial counsel inexplicably failed fully to pursue the opportunity, except to inquire of a co-defendant who had taken the stand on his own behalf whether the witness knew that Mrs. Darby was going to New York to see her husband. If there were failure here, not justified by trial strategy, that failure is hardly chargeable to the trial court. Absent any further specific allegations of prejudice, we are unable to conclude that it was error to deny a severance.

Appellant Beckwith raises two points of error, both of which lack substance. First, he claims that his prosecution was barred by the double jeopardy clause of the Fifth Amendment. His argument is based on his indictment in September, 1972, in the Eastern District of New York for possession with intent to distribute quantities of heroin and cocaine in violation of 21 U.S.C. §841(a)(1), a charge upon which he was subsequently convicted following a jury trial. He claims that the instant conspiracy prosecution arises from the same substantive violations involved in the earlier indictment.

While it is concededly true that the 1973 conviction arose out of an incident which was also part of the conspiracy for which Beckwith was indicted and upon which he was convicted below, his claim misconstrues the principle of double jeopardy. A conspiracy count may be charged along with substantive offenses in the same indictment, *Pereira v. United States*, 347 U.S. 1 (1954), or it may be charged separately, and the defendant tried separately. *United States v. Ortega-Alvarez*, 506 F.2d 455,

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457 (2d Cir. 1974), *cert. denied*, 421 U.S. 910 (1975). So long as the elements of each offense are sufficiently distinct from those of the other offenses separately charged, multiple violations of the narcotics laws arising out of a single transaction may be tried in two or more separate trials. *Id.*

Here, the charge of Beckwith's involvement with numerous co-conspirators in a far-flung narcotics venture, and the proof of his active participation from 1969-1972 in a conspiracy to import heroin and cocaine and to distribute those drugs in various United States locations, is irrefragably distinct from his earlier conviction on a single charge of possession. *United States v. Ortega-Alvarez, supra*, at 457-58. His argument that he is entitled to relief on the ground of collateral estoppel is similarly misplaced for no issue was determined in his favor at his prior trial on the substantive offense. See *Ashe v. Swenson*, 397 U.S. 436, 443 (1970); *Sealfon v. United States*, 322 U.S. 575, 578-79 (1948).

In Beckwith's second claim he argues that the evidence at trial clearly established the existence of multiple conspiracies rather than the single conspiracy charged in the indictment. This claim is frivolous. The sole substantiating point urged by Beckwith is the fact that Frank Matthews and another co-conspirator, Miguel Garcia, were separately charged in an indictment returned by the grand jury prior to the return of the indictment before us. This, he suggests, renders inescapable the conclusion that there was one conspiracy in operation from 1969-1972, and an entirely separate one from 1972-1975. However, the proof against Beckwith points to the contrary. The testimony of Cameron, Norman Coleman, Walter Rosenbaum, and other established that Beckwith worked with Matthews, John Darby, and other organization members on a continuing basis

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throughout 1969-1973. The consistency of personnel, method and type of operation throughout that period militates against a finding of discrete conspiracies and facilitates ready distinction of this case from *United States v. Bertolotti*, 529 F.2d 149 (2d Cir. 1975), where we found an improper consolidation of at least four separate and unrelated criminal ventures. There was no material variance here between the indictment and proof.

We are similarly unconvinced by appellant Bates's conclusory allegations, unsupported by any facts, of multiple conspiracies. The Government's proof established his continuous membership in the Matthews organization from 1972-1975, during which time he was chiefly involved in the distribution of drugs in Pennsylvania, both individually and in conjunction with the Darbys. Here, too, there is no evidence of prejudicial variance.

Relying on *Massiah v. United States*, 377 U.S. 201 (1964), appellant Carter contends that tape recordings of conversations between him and Norman Coleman, a Government witness, were erroneously admitted into evidence at trial. In 1972, subsequent to his agreement to cooperate with the Government, Coleman was outfitted by federal agents with a Kel transmitter. On June 5 and August 22 of that year, he recorded on the Kel set two conversations he had with Carter. At the time the recordings were made, Carter was under indictment on a Maryland state narcotics charge and was represented by counsel in that pending case. Carter contends that the tapes were obtained in violation of his rights under *Massiah* as the federal agents were aware of the Maryland prosecution.

Carter's claim is illfounded. His statements to Coleman on June 5 and August 22, 1972, were elicited and recorded in the course of an investigation wholly distinct from the

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indictment in Maryland. *Massiah* speaks only to the situation where in the absence of retained counsel, statements are deliberately elicited from a defendant in connection with a crime for which he has already been indicted. 377 U.S. at 206. See also *United States v. Edwards*, 366 F.2d 853, 873 (2d Cir. 1966), cert. denied sub nom. *Jakob v. United States*, 386, U.S. 908 (1967). The statements were properly admitted.

Carter next contends that irreparably prejudicial error was committed at trial when Special Agent Louis Candell of the Drug Enforcement Administration, testifying regarding one of the taped Carter-Coleman conversations, inadvertently mentioned that Carter had referred to his pending narcotics case in Maryland.<sup>15</sup> In response to Carter's immediate objection, Judge Mishler excused the jury. He denied Carter's motion for a mistrial, but inquired of his counsel whether he wished a corrective instruction to be given to the jury. Counsel declined the offer, stating that he feared that any further comment would merely accentuate the problem.

Undeniably, the reference to Carter's pending indictment in Maryland in the jury's presence constituted error. However, because of the overwhelming evidence of Carter's guilt and the nature and context of the comment, we are constrained to conclude that the error must be

<sup>15</sup> The relevant portion of the transcript reads as follows:

"(Tape played.)

.....

A [Candell] (Continuing) At this point Mr. Carter is talking to Mr. Coleman and he told him that he didn't have or forgot his money and he is asking Mr. Coleman to lend him some money and Mr. Coleman says he has about \$100 on him and Mr. Carter asks Coleman for \$20.

(Taped played.)

A [Candell] (Continuing) Mr. Coleman asked Mr. Carter, he said 'When are you going to be ready to do something' and as I said earlier, Mr. Carter didn't respond specifically to that question. He began to engage in a conversation about a pending narcotics case that he had against him in the state of Maryland. . . ." [Emphasis added]

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deemed harmless. It is important to note that agent Candell did not say that Carter had spoken of a conviction on a narcotics charge; the comment referred to a case pending against Carter. The outcome of that prosecution was not revealed to the jury. Further, the comment was not induced by the Government; it was inadvertent. Finally, the improper reference occurred on the tenth day of a ten-week-long trial during which the jury heard thousands of pages of testimony. The comment did not serve to deprive Carter of a fair trial. See *United States v. Stromberg*, 268 F.2d 256, 269 (2d Cir.), cert. denied, 361 U.S. 63 (1959) (inadvertent reference to defendant's having served time in jail was "an isolated [incident] during the course of a long trial"; curative instruction given); *Hardy v. United States*, 343 F.2d 233, 234 (D.C. Cir. 1964), cert. denied, 380 U.S. 964 (1965) (reference by government witness to defendant's having done "time in the penitentiary"; curative instruction declined).

Appellant Cameron argues that the admission into evidence at trial of statements made by him at the 77th Precinct stationhouse in Brooklyn, New York, on February 7, 1975, was error. He contends first that the statements were elicited and recorded in violation of his Fifth Amendment right as defined in *Massiah v. United States*, supra, and second, that the admission of the statements constituted a "gross abuse of discretion."

After the instant indictment was returned by the grand jury in January, 1975, but before it was unsealed in February of that year, Cameron was kidnapped by Black Muslims, apparently for reasons having to do with his narcotics activities. The story of his three days in captivity is a sordid tale of brutality and deprivation, the specifics of which we need not explore here. Suffice to say that he was released in the early morning hours of February 7 after payment of a ransom and arrived in somewhat battered

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condition at a relative's home in Brooklyn shortly thereafter. Upon his arrival, he was met by eight New York City police officers and was persuaded to go with them to the 77th Precinct for a "debriefing" regarding his kidnapping. Present at the police station were not only the New York authorities who questioned him, but also two of the federal agents, Officer Garay and Special Agent Mulhearn, who had been investigating Cameron's narcotics activities for purposes of the federal indictment. Cameron was then questioned without an attorney present for some 4½ hours,<sup>16</sup> and the entire interview, unbeknownst to Cameron, was tape recorded. Certain self-inculpatory statements regarding his narcotics activity made by Cameron in the course of the interview were admitted into evidence at trial following Judge Mishler's conduct of a suppression hearing.

Turning to the first prong of Cameron's argument, his *Massiah* claim, we do not agree that the statements were obtained in violation of Cameron's Sixth Amendment rights. While the federal agents were present in the stationhouse at the time of Cameron's questioning, they merely listened to the interview over an intercom of sorts down the hall from the room in which the debriefing was conducted. They neither posed questions nor suggested lines of inquiry. Further, as Judge Mishler emphasized, while the New York police officers who questioned Cameron were aware of a federal investigation of appellant's narcotics activities, they were not told of Cameron's pending federal indictment. As we previously

<sup>16</sup> No *Miranda* warnings were given Cameron, and prior to trial he sought to suppress the statements on the additional ground that they had been elicited in violation of his rights under *Miranda v. Arizona*, 384 U.S. 436 (1966). Judge Mishler ruled that *Miranda* was inapplicable here as Cameron was questioned as the victim of a crime, not as a suspect, and the interview was non-custodial. Cameron has apparently now abandoned this argument.

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stated in *United States v. Garcia*, 377 F.2d 321, 324 (2d Cir.), *cert. denied*, 389 U.S. 991 (1967), *Massiah* does not "apply in a case in which the questioner was completely unaware of the existence of the indictment and was not seeking information about the crime the indictment charged had been committed." Here, Cameron was taken to the stationhouse for the avowed purpose of questioning him as a kidnapping victim, not as the suspect of a federal crime; and there is no indication that this was a ruse or a surreptitious effort by the federal agents to improperly gather post-indictment evidence. It would take some distortion of the facts to conclude, as Cameron would have us conclude, that this was a deliberate effort by the New York authorities to elicit incriminating statements concerning his involvement in the crime for which he had been indicted by the federal grand jury. *United States v. Garcia*, *supra*. Finally, the fact that the officers in the 77th Precinct had been telephoned at some point prior to Cameron's interview by an attorney representing Cameron in a separate pending criminal appeal did not, under *Massiah*, obligate the officers to notify that attorney prior to interviewing Cameron. See *United States v. Masullo*, 489 F.2d 217, 222-23 (2d Cir. 1973).

We are also unpersuaded by Cameron's claim that he was forced to accompany the officers to the 77th Precinct and to remain there against his will, and therefore that his statements were not voluntarily made. After hearing the officers' and Cameron's accounts of the interview at the suppression hearing, and after reviewing the transcript of the interview, Judge Mishler concluded that Cameron's statements at the stationhouse had been freely and voluntarily made. He found that Cameron, a college graduate with "extraordinary familiarity with leading Supreme Court decisions," was fully aware of his right to refuse to be interviewed, and knew that the police had no

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lawful means to compel him to answer questions. We find no error in the trial court's well-supported conclusion that Cameron's statements and presence at the stationhouse were "matters of choice."

Cameron's assertion that it was an abuse of discretion for Judge Mishler to admit the stationhouse statements is insubstantial. This argument appears to be premised on the erroneous assumption that the statements were admitted as evidence of other crimes. The transcript demonstrates, however, that the statements were admitted as admissions relevant to proof of his membership in the narcotics conspiracy. And it can hardly be contested that statements such as "[y]ou might think I'm a bad guy because I deal in drugs, I, I've sold drugs," or "when you are in drugs. . . . I don't mean no street corner pusher—you got a network of so much information. . . ." were relevant to Cameron's knowledge of, and his intent and culpability with reference to, the crime charged. In the first statement heard by the jury, Cameron spoke of his former involvement in the "business" when "I had what I paid them in my closet. I had that kind of money in my closet. My wife could put her hand on it just like that." The jury could reasonably infer that the "business" of which he spoke was narcotics, and the statement was of particular relevance inasmuch as there had earlier been testimony at the trial that Matthews kept money used in the narcotics operation stacked in piles in a closet at 130 Clarkson Avenue. These, and additional statements regarding extortion practiced upon narcotics dealers in Philadelphia, the slaying of "one of Frank Matthews lieutenants," and Cameron's view that the drug business was "all over" because the "guys that are in it are stuck in it, but there ain't no new guys coming in," tended to show Cameron's familiarity with the Matthews operation and narcotics activity in general. We accordingly uphold the

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admissibility of the statements.

We have carefully considered the remaining two claims advanced by Bates, and John Darby's additional point, and we find them to be without merit.

Judgment of conviction reversed as to Hinton, with instructions that the indictment be dismissed as to her; judgment affirmed as to all other appellants.

## APPENDIX C

ORDERS OF DENIAL FOR REHEARING AND  
REHEARING EN BANC

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the sixteenth day of November, one thousand nine hundred and seventy-six.

Present:

HON. STERRY R. WATERMAN

HON. PAUL R. HAYS

HON. THOMAS J. MESKILL

*Circuit Judges.*

75-1402

75-1418

75-1441

75-1442

75-1443

75-1444

75-1445

76-1024

United States of America,

Plaintiff-Appellee,

v.

## Appendix C

Frank Matthews, a/k/a "Pee Wee", "Big Book", "Frank McNeil", "Mark IV Frank", Barbara Hinton, a/k/a "Barbara Matthews", Gattis Hinton, a/k/a "Bud", "Slim", "Joseph Jackson", William Beckwith, a/k/a "Mickey", "McGill", "Miguel", Donald Conner, Robert Currington, a/k/a "Pedro", Charles William Cameron, a/k/a "Swayzie", James Wesley Carter, a/k/a "Brother Carter", "Big Head Brother", "Big B", John Darby a/k/a "Pop", "John Smith", Thelma Dabry, a/k/a "Flossie", "Thelma Reese", David Clement Bates, a/k/a "Rev. Walter Rosenbaum, Ernest Robinson, a/k/a "Ernie", James E. Martinez, Scarvey McCargo, Fred Brown, Lucy Mathews, Marzella Steele Webb,

Defendants,

Barbara Hinton, a/k/a "Barbara Matthews", William Beckwith, a/k/a "Mickey", "McGill", "Miguel", James Wesley Carter, a/k/a "Brother Carter", "Big Head Brother", "Big B", Scarvey McCargo, Charles William Cameron, a/k/a "Swayzie", John Darby, a/k/a "Pop", John Smith, Thelma Darby, a/k/a "Flossie", "Thelma Reese", David Clement Bates, a/k/a "Rev." Walter Rosenbaum,"

Defendants-Appellants.

A petition for a rehearing having been filed herein by counsel for the appellant, Charles William Cameron, a/k/a "Swayzie"

Upon consideration thereof, it is

Ordered that said petition be and hereby is denied.

A. DANIEL FUSARO  
Clerk

*Appendix C*

## UNITED STATES COURT OF APPEALS

## SECOND CIRCUIT

At a stated term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the sixteenth day of November, one thousand nine hundred and seventy-six.

75-1402, 75-1418,  
75-1441-45, 76-1024

United States of America,

Plaintiff-Appellee,

v.

Frank Matthews, a/k/a "Pee Wee", "Big Book", "Frank McNeil", "Mark IV Frank", Barbara Hinton, a/k/a "Barbara Matthews", Gattis Hinton, a/k/a "Bud", "Slim", "Joseph Jackson", William Beckwith, a/k/a "Mickey", "McGill", "Miguel", Donald Conner, Robert Currington, a/k/a "Pedro", Charles William Cameron, a/k/a "Swayzie", James Wesley Carter, a/k/a "Brother Carter", Big Head Brother, "Big B", John Darby, a/k/a "Pop", "John Smith", "Thelma Darby, a/k/a "Flossie", "Thelma Reese", David Clement Bates, a/k/a "Rev." Walter Rosenbaum, Ernest Robinson, a/k/a "Ernie", James E. Martinez, Scarvey McCargo, Fred Brown, Lucy Mathews, Marzella Steele Webb,

Defendants,

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Barbara Hinton, a/k/a "Barbara Matthews", William Beckwith, a/k/a "Mickey", "McGill", "Miguel", James Wesley Carter, a/k/a "Brother Carter", "Big Head Brother", "Big B", Scarvey McCargo, Charles William Cameron, a/k/a "Swayzie", John Darby, a/k/a "Pop", "John Smith", Thelma Darby, a/k/a "Flossie", "Thelma Reese", David Clement Bates, a/k/a "Rev.",

Defendants-Appellants.

A petition for rehearing containing a suggestion that the action be reheard en banc having been filed herein by counsel for the defendant-appellant, Charles William Cameron a/k/a "Swayzie", and no active judge or judge who was a member of the panel having requested that a vote be taken on said suggestion,

Upon consideration thereof, it is

Ordered that said petition be and it hereby is DENIED.

s/ Irving R. Kaufman  
IRVING R. KAUFMAN,  
Chief Judge

No. 76-814

Supreme Court, U. S.

FILED

APR 6 1977

MICHAEL RODAK, JR., CLERK

**In the Supreme Court of the United States**

**OCTOBER TERM, 1976**

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**CHARLES WILLIAM CAMERON, PETITIONER**

**v.**

**UNITED STATES OF AMERICA**

---

***ON PETITION FOR A WRIT OF CERTIORARI TO  
THE UNITED STATES COURT OF APPEALS FOR  
THE SECOND CIRCUIT***

---

**BRIEF FOR THE UNITED STATES IN OPPOSITION**

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**WADE H. MCCREE, JR.,**  
***Solicitor General,***

**BENJAMIN R. CIVILETTI,**  
***Assistant Attorney General,***

**MARC PHILIP RICHMAN,**  
**ROBERT J. ERICKSON,**  
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***Department of Justice,***  
***Washington, D.C. 20530.***

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# In the Supreme Court of the United States

OCTOBER TERM, 1976

---

No. 76-814

CHARLES WILLIAM CAMERON, PETITIONER

v.

UNITED STATES OF AMERICA

---

ON PETITION FOR A WRIT OF CERTIORARI TO  
THE UNITED STATES COURT OF APPEALS FOR  
THE SECOND CIRCUIT

---

BRIEF FOR THE UNITED STATES IN OPPOSITION

---

OPINION BELOW

The opinion of the court of appeals (Pet. App. B) is reported at 543 F. 2d 1002.

JURISDICTION

The judgment of the court of appeals was entered on September 27, 1976 (Pet. App. A). A petition for rehearing with a suggestion for rehearing *en banc* was denied on November 16, 1976 (Pet. App. C). The petition for a writ of certiorari was filed on December 14, 1976. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

I.—Whether petitioner's Sixth Amendment right to counsel was violated when state police officers who did

not know that petitioner had been indicted by a federal grand jury for narcotics violations questioned him out of the presence of counsel about a kidnapping of which petitioner was the victim.

2. Whether evidence that petitioner failed to file income tax returns was properly admitted to show that he had no legitimate source for the monies he spent during the period of the narcotics conspiracy charged in the indictment.

#### STATEMENT

Following a ten-week jury trial in the United States District Court for the Eastern District of New York, petitioner was convicted of conspiring to import, possess, and distribute heroin and cocaine, in violation of 21 U.S.C. 846.<sup>1</sup> He was sentenced to eight years' imprisonment, a special parole term of five years, and a \$5,000 fine. The court of appeals affirmed (Pet. App. B).

1. The evidence adduced at trial revealed a massive, multi-tiered narcotics conspiracy operating from 1968 through 1975.<sup>2</sup> The conspiracy was responsible for the

<sup>1</sup>Seven co-defendants were also convicted of conspiracy, and some of them were convicted on related substantive charges as well. The sentences ranged from two to fifteen years' imprisonment. The court of appeals affirmed all the convictions except one, and this Court has denied certiorari petitions filed by three co-defendants: *Carter v. United States*, No. 76-582, certiorari denied, November 29, 1976; *Darby v. United States*, No. 76-5783, certiorari denied, January 10, 1977; *Bates v. United States*, No. 76-5823, certiorari denied, January 17, 1977.

Two other co-defendants pleaded guilty and five were acquitted by the jury. Three co-defendants, including Frank Matthews, are fugitives.

<sup>2</sup>The evidence is recounted in detail in the government's brief in the court of appeals (pp. 3-35), a copy of which is being lodged with the Clerk of this Court.

importation and distribution of huge quantities of heroin and cocaine; in 1971 alone, the conspirators distributed over 900 kilograms of narcotics (Tr. 2289-2317).<sup>3</sup> The central figure in this narcotics organization was Frank Matthews, who directed the importation of narcotics (largely from Venezuela), its processing at the organization's New York "cutting mills," and its distribution to major narcotics dealers in at least five States.

Petitioner participated in the conspiracy by receiving large quantities of heroin and cocaine from the organization and distributing the narcotics in North Carolina (Pet. App. 8a). Petitioner was seen at one of the organization's major narcotics "cutting mills" in New York (Tr. 495-497, 502-503, 508) and at a New York bar that served as a meeting place for members of the organization and wholesale narcotics buyers (Tr. 704-711, 772). On one occasion petitioner demonstrated the proper method of bagging heroin to one of Matthews' employees, from whom petitioner subsequently bought a package containing several ounces of heroin (Tr. 773-780). There was also evidence that at one point Matthews was unable to locate petitioner when he wanted to deliver heroin to him (Tr. 509-515, 656-657), that petitioner twice sent money to Matthews through an intermediary (Tr. 512-513, 521, 652-653), and that petitioner owed Matthews \$50,000 (Tr. 4339-4340).

2. A sealed indictment was returned against petitioner in the instant case on January 29, 1975. On February 4, 1975, petitioner was abducted by Black Muslims, who demanded a ransom for his release (S. H. 251-252, 257-258, 264). The New York City Police established a

<sup>3</sup>"Tr." refers to the trial transcript. "S.H." refers to the transcript of the pre-trial suppression hearing. "G.A." refers to the government's appendix in the court of appeals.

"command post" at the apartment where petitioner's wife was staying, both to provide protection for the family and to monitor telephone calls for ransom demands.

The ransom was paid and petitioner was released on February 7, 1975. He went to the apartment, where he was met by police officers who described the efforts they had made on his behalf and persuaded petitioner to accompany them to the station house for a "debriefing" on the kidnapping (S.H. 208-209, 266-269).

Police Captain James Stepoe was in charge of the kidnapping investigation and conducted the debriefing.<sup>4</sup> In relating the events of the kidnapping, petitioner made several statements about his previous activities in the narcotics trade.<sup>5</sup> Petitioner was questioned as the victim of a crime rather than as a suspect and accordingly was not given any *Miranda* warnings (S.H. 171). Captain Stepoe did not know that a sealed indictment had already been returned against petitioner (S.H. 87, 184-185).

<sup>4</sup>Prior to petitioner's release, Captain Stepoe had been advised that petitioner's "drug background" was a possible motive for his abduction (S.H. 22). Several other police officers and an FBI agent involved in the kidnapping investigation (but not in the instant narcotics case) assisted Stepoe in conducting the interview.

<sup>5</sup>Petitioner said that "[w]hen I was doing business [i.e., in narcotics], I had what I paid them [the kidnapers] in my closet" and "[m]y wife could put her hand on it just like that"; that "when you are in drugs, man, a big one [and not a] street corner pusher \* \* \* you got a network of so much information \* \* \*"; that "[y]ou might think I'm a bad guy because I deal in drugs, I. I've sold drugs"; that he was familiar with extortion practiced upon drug dealers in Philadelphia; and that he believed that the narcotics trade was on the decline because "the guys that are in it are stuck in it, but there ain't no new guys coming in" (Tr. 4107-4121).

Stepoe also did not know that, apparently as a result of his general directive to notify all intelligence units of petitioner's release (S.H. 100), two federal agents of the federal-state New York Drug Enforcement Task Force were present at the station house and were able to hear petitioner over a loudspeaker in another room. The agents did not, however, participate in the debriefing in any way (S.H. 391-392, 451-452). The debriefing interview was recorded (without petitioner's knowledge) and the tapes containing petitioner's statements regarding his involvement in narcotics trafficking were introduced into evidence at trial.

#### ARGUMENT

1. Petitioner, relying on *Massiah v. United States*, 377 U.S. 201, argues (Pet. 8) that the incriminatory statements made during the debriefing were obtained in violation of his Sixth Amendment right to counsel and therefore should not have been admitted into evidence. As the court of appeals correctly held, however, it would require a "distortion of the facts" of the present case to bring it within the *Massiah* rule (Pet. App. 31a).

In our view that rule applies only when law enforcement officials deliberately attempt, in defense counsel's absence, to elicit incriminating information about a crime from a defendant whose right to counsel in respect of that crime has already attached by virtue of the institution of judicial proceedings (such as the return of an indictment) against him. In *Massiah* itself, after the defendant had been indicted on narcotics charges and released on bail, federal agents arranged for an informant to elicit and secretly transmit to the agents stationed nearby inculpatory information concerning the crime that was the subject of the indictment. This Court held (377 U.S. at 206) "that the [defendant] was denied the basic

protections of [the Sixth Amendment right to counsel] when there was used against him at his trial evidence of his own incriminating words, which *federal agents had deliberately elicited from him* after he had been indicted and in the absence of his counsel" (emphasis added).

*Brewer v. Williams*, No. 74-1263, decided March 23, 1977, also indicates that *Massiah* applies only in cases of purposeful attempts by law enforcement officials to take advantage of the absence of defense counsel in questioning a defendant about a crime in respect to which the Sixth Amendment right to counsel has already attached. There the defendant, who was being sought in Des Moines, Iowa, in connection with the abduction of a child, surrendered and was arraigned in Davenport, Iowa, 160 miles away. The defendant was represented by counsel in both Des Moines and Davenport, and the Des Moines police officers who drove to Davenport to bring the defendant back promised both counsel that they would not question the defendant about the crime during the trip. In disregard of that agreement, however, one of the officers did interrogate the defendant, who in response directed the officers to the location where he had hidden the child's body.

In holding that the fruits of the interrogation were inadmissible, this Court observed that the officer had "deliberately and designedly set out to elicit information from" the defendant (slip op. 10), that no Sixth Amendment right to counsel "would have come into play if there had been no interrogation" (*id.* at 11), and that "[t]he circumstances of this case are thus constitutionally indistinguishable from those presented" in *Massiah* (*id.* at 11-12).

In the instant case, by contrast, petitioner's statements were not the result of a deliberate attempt by law enforcement officers to gain information for use against him in a subsequent trial on the narcotics charge, and therefore his

constitutional right to counsel never came into play and could not have been violated. Indeed, as both courts below found (Pet. App. 30a), Captain Steproe and the other participating officers did not even know that petitioner had been indicted. Their questioning of him as a recently released kidnapping victim was entirely reasonable, and any inculpatory information divulged by petitioner during that questioning was not subject to suppression simply because petitioner had been named in a sealed indictment. As the Second Circuit stated in *United States v. Garcia*, 377 F. 2d 321, 324, certiorari denied, 389 U.S. 991 (footnote and citations omitted):

*Massiah* was \* \* \* not aimed at all post-indictment evidence gathered by the prosecution, but at the narrow situation where, after indictment, law enforcement authorities have "deliberately elicited" incriminating statements from a defendant by direct interrogation or by surreptitious means. The rule does not apply to spontaneous or voluntary statements made by the defendant in the presence of government agents \* \* \* or when the person hearing the statement is not a government agent at the time the statement is made. \* \* \* Nor should it apply in a case in which the questioner was completely unaware of the existence of the indictment and was not seeking information about the crime the indictment charged had been committed. *Massiah* \* \* \* only protects against deliberate efforts of law enforcement agents which are specifically aimed at eliciting incriminating statements relative to the crime under indictment. \* \* \* Certainly in a case like this where the agent is unaware of \* \* \* the existence of an indictment, he cannot be said to be deliberately eliciting a statement in violation of *Massiah*. \* \* \*

See also *Grieco v. Meachum*, 533 F. 2d 713, 717 (C.A. 1) ("[I]f the circumstances of this case were that neither [of the agents] knew of the indictment pending against [the defendant], and inadvertently had been made aware of these incriminatory statements while pursuing other inquiries, we would be inclined to find that *Massiah* was not violated.")<sup>6</sup> Cf. *Procunier v. Atchley*, 400 U.S. 446, 447 n. 1.

If the federal agents who overheard petitioner's incriminatory remarks had participated in the questioning, or told or even suggested to Captain Stepoe what questions

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<sup>6</sup>The First Circuit has disagreed with the view that *Massiah* applies only when there has been a deliberate effort by law enforcement officials to elicit information about a crime for which the defendant has already been indicted. See *Hancock v. White*, 378 F. 2d 479, 482 (C.A. 1), holding that *McLeod v. Ohio*, 381 U.S. 356, reversing *per curiam* 1 Ohio St. 2d 60, 203 N.E. 2d 349, indicates that *Massiah* "applies to exclude post-indictment incriminating statements of an accused to government agents in the absence of counsel even when not deliberately elicited by interrogation or induced by misapprehension engendered by trickery or deception." The issue was not posed in *Brewer v. Williams*, *supra*, and accordingly we do not take the Court's citation of *McLeod* and *Hancock* in that decision (slip op. 12) as indicating approval of the First Circuit's position in this regard. Indeed, the Court's ruling that the protection of the Sixth Amendment right to counsel would not have come into play had there been no interrogation (*id.* at 11) indicates that the First Circuit's interpretation of *Massiah* was incorrect.

In any event, even assuming that the First Circuit would adhere to its position notwithstanding *Brewer v. Williams*, both *McLeod* and *Hancock* are nevertheless materially different from the present case. In those cases the defendant made incriminating statements, while he was in custody, to law enforcement officials who were fully aware that an indictment had already been returned. As *Grieco v. Meachum*, *supra*, indicates, the First Circuit would reach a different result where, as here and as in *United States v. Garcia*, *supra*, the officer who questioned the defendant had no knowledge that an indictment had already been issued.

to ask, then presumably the rule of *Massiah* would have been violated notwithstanding Stepoe's ignorance of the indictment. But there is no evidence whatsoever that the federal agents (who knew that an indictment had been returned) were attempting to get the state officers to do what *Massiah* would have forbidden the federal officers from doing themselves. See S.H. 391-392, 451-452. It is true that Captain Stepoe was aware that petitioner was involved in narcotics activity and that some of his questions of petitioner touched upon the subject of narcotics. But petitioner himself had volunteered that he was kidnapped by a Black Muslim organization that allegedly was responsible for similar kidnappings (and murders) of narcotics dealers (see, e.g., G.A. 286-287, 292) and that allegedly had a list of 20 to 30 other individuals marked for future kidnapping (G.A. 294-296). It was therefore highly pertinent to the kidnapping investigation for Stepoe to pursue a line of inquiry designed to discover information relating to the motives for the kidnapping, the identities of the kidnappers, their methods of operation, and the identities of their past and future intended victims. Captain Stepoe was not engaged in a deliberate attempt to elicit information from petitioner for use against petitioner at trial on an indictment that Stepoe did not even know had been returned, and accordingly the admission into evidence of petitioner's incriminating statements did not contravene *Massiah*.<sup>7</sup>

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<sup>7</sup>Petitioner suggests (Pet. 10) that, since an attorney who had represented him in a prior state narcotics prosecution had telephoned the officers during the period of his captivity and advised them of this representation, the attorney "was entitled to be notified of the proposed interrogation of his client" (*ibid.*). But there is no indication that petitioner was that attorney's "client" in respect of a crime of which petitioner was the victim. Moreover, as we have shown above, petitioner's Sixth Amendment right to counsel never came into play in this case since he was not subject to interrogation in *Massiah*-type circumstances. Thus Captain Stepoe's failure to

2. Petitioner states (Pet. 9) that the court of appeals' conclusion that his statements were voluntary "is open to question." We disagree for the reasons stated in the first instance by the district court (G.A. 89-90):

First, with respect to his claimed inability to refuse to answer questions, the transcript shows that [petitioner] was logical, articulate, and responsive to the questions. It is obvious that he was fully aware of what he was saying and that he voluntarily and intentionally gave the answers. Although he was fatigued, the tape provides clear, consistent evidence of [petitioner's] ability to refuse to answer questions throughout the interview. [Footnote omitted.] [Petitioner] demonstrated that he was able to withhold information, thus indicating that making statements was a matter of conscious choice. [See, e.g. G.A. 397, 405-407, 419, 459-460, 490-494.]

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[Petitioner also] urges that his appearance at the precinct was compelled. Sgt. Santise appealed to [petitioner's] sense of decency and gratitude. To

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notify an attorney who represented petitioner in an unrelated matter could not have deprived petitioner of any constitutional rights.

Petitioner's reliance (Pet. 10) on *United States v. Satterfield*, C.A. 2, No. 76-1372, decided December 7, 1976—holding that post-indictment statements must be suppressed unless the accused has made a knowing and intelligent waiver of counsel under the standards announced in *Faretta v. California*, 422 U.S. 806, 835—is misplaced. Although we think *Satterfield* was wrongly decided, we note that the Second Circuit itself distinguished that case from the present case, "where a defendant indicted by a federal grand jury made statements to New York police who were unaware that the defendant had been indicted" (slip op. 809 n. 1).

that limited extent there was coercion. However, the tape provides a complete answer to the claim. Throughout the interview [petitioner] repeats the reasons why he agreed to talk to the police. He was grateful for what the police had done to help rescue him and to protect his family [G.A. 276, 417]. He was also desirous of continued protection, and was willing to cooperate in return for such protection [G.A. 457-459, 466, 492]. Also, he wanted to give some information which might lead to the apprehension of his abductors [G.A. 293-295, 307, 417, 495]. These various motives, articulated by [petitioner] himself, demonstrate vividly that it was his gratitude and self-interest, not compulsion, which prompted him to talk to the police. The desire of the police to get as much information from [petitioner] as they could was natural and understandable. [Petitioner] likewise had reasons for remaining.

The record fully supports the determination of both courts below that petitioner's statements were voluntary and the issue does not merit further review.<sup>8</sup> *Berenyi v. Immigration Director*, 385 U.S. 630, 635; *Graver Mfg. Co. v. Linde Co.*, 336 U.S. 271, 275.<sup>9</sup>

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<sup>8</sup>Petitioner also suggests (Pet. 4) that he should have been given *Miranda* warnings prior to his debriefing. Although this issue was raised in the district court, petitioner apparently abandoned it in the court of appeals (Pet. App. 30a n. 16) and accordingly cannot raise it here. *Adickes v. Kress & Co.*, 398 U.S. 144, 147 n. 2; *Lawn v. United States*, 355 U.S. 339, 362-363 n. 16. In any event, there was no *Miranda* violation, for petitioner was not questioned about a crime he was suspected of committing, and was not in custody when the statements were made. See Pet. App. 30a. Cf. *Oregon v. Mathiason*, No. 76-201, decided January 25, 1977.

<sup>9</sup>Petitioner also argues (Pet. 11) that he was somehow "improperly stamped" as a narcotics dealer when the jury "learn[ed]" that he had recently been kidnapped for ransom by the Black

3. Petitioner further contends (Pet. 11-14) that the district court erred in admitting evidence that petitioner had not filed federal income tax returns for the years 1969 to 1974.

Petitioner was charged as a major participant in a highly organized, multi-million dollar drug conspiracy. As evidence of his involvement it was permissible for the government to introduce proof that he spent large amounts of money (see *United States v. Jackskion*, 102 F. 2d 683, 684 (C.A. 2), certiorari denied, 307 U.S. 635). Proof that petitioner failed to file income tax returns during the relevant period was in turn admissible to negate the existence of any legitimate source for that money.<sup>10</sup> See *United States v. Falley*, 489 F. 2d 33, 38-39 (C.A. 2).

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Muslims." But the government did not present testimony that petitioner was kidnapped by Black Muslims (see Tr. 4104-4121). Rather, as a predicate for the introduction of petitioner's admissions, the government adduced testimony to the effect that petitioner had been kidnapped, released, and interviewed (Tr. 4102-4103). Petitioner's admissions did of course reveal that he had a substantial involvement in the drug trade, but this revelation came from petitioner's own words, not from any speculative inference that "Black Muslims" only kidnap "well-heeled" narcotics seller[s]" (Pet. 11).

<sup>10</sup>Petitioner claims (Pet. 11-12) that there was no evidence to show that he had acquired or spent large sums of money during the conspiratorial period. To the contrary, the evidence showed that, although he had been unemployed since September 1968, petitioner lived in various rental apartments during the course of the conspiracy; that he had purchased and registered a new Lincoln Mark III in 1970; and that he had used a Master Charge Card in traveling to various cities and spent in excess of \$3,000 on charges during this time. See Tr. 5814-5815, 5815-5820, 5825-5833, 6007-6010, 6030-6035.

It is true that in *United States v. Falley* the government introduced evidence that the defendant had filed tax returns reporting only limited income, while here the evidence was that petitioner filed no returns at all. As the court of appeals correctly ruled, however, this distinction goes to the weight of the evidence, not to its relevance or admissibility (Pet. App. 24a):

While proof of non-filing [is] concededly of less probative force than a tax return showing minimal income, there can be little doubt that it does tend to negate the existence of a legitimate source of income. It is hardly conclusive, but it is undeniably relevant. The determination of the weight which might properly be accorded it was for the jury's determination, and they were so instructed. [Petitioner] w[as] free to rebut this evidence with proof that [he] had sufficient prior net worth to fund the expenditures [he] had made, or that [he] obtained the necessary funds through non-reportable, non-taxable sources, but [he] apparently offered no such explanations. We agree with Judge Mishler that the probative value of the evidence outweighed any incidental prejudice \* \* \*.

#### CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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